In the Supreme Court of the United States

October TERM, 1976

NO. 76-527

Edward H. Lowe, et al

Petitioner

VS.

City of Jackson, Mississippi

Respondent

PETITION FOR WRIT OF CERTIORARI TO

The Supreme Court of Mississippi

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INDEX

APPENDIX

CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO._____

Edward H. Lowe, et al

Petitioner

VS.

City of Jackson, Mississippi

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner, **Edward H. Lowe,** et al, prays that a writ of certiorari issued to review the judgment and opinion of the Supreme Court of Mississippi, which opinion was handed down, July 27, 1976 and the petition for rehearing was acted upon and denied on September 7, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is reported in 336 So 2d 490 and it appears at Appendix A

in this petition. The petition for rehearing was denied September 7, 1976, and appears in the appendix at page A25. The order denying the petition for rehearing appears in the appendix commencing at page A26. The opinion of the Chancery Court of the First Judicial District of Hinds County Mississippi is shown in the Appendix at pages A12 through A24. The motion to Dismiss on the grounds of the unconstitutionality of the Statutes and the Order overruling the motion are shown in the Appendix at pages A7 through A11.

JURISDICTION

The Opinion and Affirmation of the Supreme Court of Mississippi was rendered July 27, 1976 and the Petition for Rehearing was denied September 7, 1976. The Petition for Rehearing and the order overruling the Motion for rehearing are shown in the Appendix of this brief at Pages A25 and A26.

The Petition for Certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of the Court is invoked under 29 U.S.C. 1257(3). Sections 21-1-27, 21-1-13 and 21-1-45 of the Mississippi Code 1972 are shown at Pages 5 through 9 in the Appendix.

QUESTIONS PRESENTED

The question presented in this petition is:

1. Whether Section 21-1-27 of the Mississippi Code 1972 violates the Equal Protection Clause of the Four-

teenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment of the Constitution of the United States.

2. Sections 21-1-27, 21-1-13 and 21-1-45 of the Mississippi Code 1972.

STATEMENT OF THE CASE

The City of Jackson, Mississippi, on August 27, 1974, enacted an ordinance extending and enlarging the corporate limits of the city. The area proposed to be annexed consists of 52.13 square miles, or 33,363.20 acres of land. The ordinance was published and;

On September 13, 1974, the city filed its Petition in the Chancery Court of the First Judicial District of Hinds County, Mississippi, for ratification, approval and confirmation of the ordinance. The ordinance in general terms described the proposed improvements to be made in the territory proposed for annexation, the manner and extent of such improvements, and the approximate time within which such improvements are to be made. It stated that the city shall make following improvements in the territory proposed for annexation within a reasonable time:

Improve existing streets and drainage.

The ordinance further set out a statement of the municipal or public services which the city proposed to render in the annexed territory, to-wit: Police and fire protection, sanitation, pest control and maintenance of existing streets as well as their right to vote in city elections.

The Court fixed the date for hearing the petition on October 28, 1974.

An estimated 26,000 people live in the territory sought for annexation. Approximately 1,800 signed, objections were filed.

After hearing and overruling Appellants' Motion for Dismissal on the grounds of the unconstitutionality of Section 21-1-27 Mississippi Code of 1972, and other motions, the Court set a hearing on the merits began on November 25, 1974. The testimony was concluded on February 20, 1975. This matter was taken under advisement to afford the Court time within which to study the voluminous exhibits introduced in evidence, and to review the testimony adduced and on April 25, 1975, rendering its decision and Decree allowing the annexation but deleting certain territory.

Appellants appealed and sought reversal of this case in the Supreme Court of Mississippi.

By opinion dated July 27, 1976, the Supreme Court of Mississippi affirmed the Chancellor's Actions.

The Supreme Court held that the annexation statute was not invalid on the ground that it did not allow persons in the proposed area of annexation to express

their approval or disapproval and that there was substantial evidence to support the determination and that the annexation was reasonable and required by public convenience and necessity.

The Court further held that the Mississippi statute granting power to an incorporated municipality to annex territory did not violate equal protection clause because the inhabitants of the area to be annexed are not permitted to express their approval or disapproval by voting.

Further the Court in making the determination construed Sections 21-1-27, 21-1-13 and 21-1-45 of the Mississippi Code of 1972 and determined the Statutes to be Constitutional.

REASONS FOR GRANTING THE WRIT

The Decision of the Supreme Court of Mississippi directly conflicts with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

The extension of corporate boundaries of a municipality is allowed by legislative enactment, being Section 21-1-27 Mississippi Code of 1972. That Section is as follows:

> 21-1-27. Passing of ordinance.
> The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof

by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory proposed to be included in or excluded from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall in general terms describe the proposed improvements to be made in the annexed territory, the manner and extent of such improvements, and the approximate time within which such improvements are to be made; such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement showing whereby the public convenience and necessity would be served thereby.

Section 21-1-13 of the Mississippi Code of 1972 requires a petition signed by two-thirds of qualified electors residing in a territory to be incorporated into a municipality. That Section is as follows:

> 21-1-13. Preparing and filing of petition. Whenever the inhabitants of any unincorporated territory shall desire to incorporate

> such territory as a city or town, they shall prepare a petition and file same in the chancery court of the county in which such territory is located or, if the territory is located in more than one county, the chancery court of either county. Said petition shall meet the following requirements:
>
> (1) it shall describe accurately the metes and bounds of the territory proposed to be incorporated and there shall be attached to such petition a map or plat of the boundaries of the proposed municipality;
>
> (2) it shall set forth the corporate name which is desired;
>
> (3) it shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be incorporated;
>
> (4) it shall set forth the number of inhabitants of such territory;
>
> (5) it shall set forth the assessed valuation of the real property in such territory according to the latest available assessments thereof;
>
> (6) it shall state the aims of the petitioners in seeking said incorporation, and shall set forth the municipal and public services which said municipal corporation proposes to render and the reasons why the public convenience and

necessity would be served by the creation of such municipal corporation;

(7) it shall contain a statement of the names of the persons the petitioners desire appointed as officers of such municipality; and

(8) it shall be sworn to by one or more of the petitioners. When such a petition shall be filed, it shall be docketed as are other suits and causes in the chancery courts of this state.

Section 21-1-45 provides for a vote by petition of two-thirds of the qualified electors to be included or excluded from certain territory adjacent to or residing in the corporate limits of a municipality. That Section is as follows:

21-1-45. Electors' option to be included in or excluded from existing municipality-preparing and filing of petition.

The qualified electors of any territory contiguous to and adjoining any existing municipality and the qualified electors of any territory which is a part of an existing municipality, may be included in or excluded from such municipality, as the case may be, in the manner hereinafter provided. Whenever the inhabitants of any incorporated territory adjacent to any municipality shall desire to be included therein, and whenever the inhabitants of any territory which is a part of an existing municipality shall desire to be excluded therefrom,

they shall prepare a petition and file same in the chancery court of the county in which such municipality is located, which said petition shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be included in or excluded from such municipality. Said petition shall describe accurately the metes and bounds of the territory proposed to be included in or excluded from such municipality, shall set forth the reasons why the public convenience and necessity would be served by such territory being included in or excluded from such municipality, as the case may be, and shall be sworn to by one or more of the petitioners. In all cases, there shall be attached to such petition a plat of the municipal boundaries as same will exist in the event the territory in question is included in or excluded from such municipality. No territory may be so excluded from a municipality within two years from the time that such territory was incorporated into such municipality, and no territory may be so excluded if it would wholly separate any territory not so excluded from the remainder of the municipality. No petition for the inclusion or exclusion of any territory under this section shall be filed within two years from the date of any adverse determination of any proceedings originated hereinafter under this chapter for the inclusion or exclusion of the same territory.

Section 21-1-27 of the Mississippi Code 1972 was the basis for the city's annexation ordinance. This Section denies the right to the qualified electors to vote by petition or otherwise and therefore denies Equal Protection as guaranteed by the Constitution.

The traditional standard of review under the equal protection clause of the Fourteenth Amendment is to examine whether the objective the state seeks to further by classification is legitimate and, if so, whether the classification bears a rational relation to the objective. E.g., McGowan v. Maryland, 366 U.S. 420, 425 (1961). In cases involving the abridgement or deprivation of rights classified as "fundamental", the Supreme Court has adopted a more stringent standard of review: the compelling state interest standard. Succinctly stated, the compelling state interest standard is "whether the exclusion is necessary to promote a compelling state need". Thus, the Supreme Court has held to be "fundamental" the constitutional right to vote, Kramer V. Union Free School District, 395 U.S. 620 (1969). The deprivation of this fundamental right must be justified by a compelling state interest.

In a free society and in this Republican form of government no right is more fundamental than the right to vote and to participate in the political process including annexation and/or incorporation of a new municipality. In 1886, the Supreme Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Yick Wo. v. Hopkins, 118 U.S. 356, 379 (1886). In Reynolds Sims, 377 U.S. 533, 561-2 (1963) the Supreme Court stated:

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpared manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be fully and meticulously scrutinized".

The Supreme Court has clearly and unequivocably enuciated the principle that a nenial of the fundamental right to vote by a state must be subjected to the compelling state interest test.

> If a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to other, the Court must determine whether the exclusions are necessary to promote a compelling state interest. Kramer v. Union Free School District, 395 U.S. 621, 627 (1969).

In the case decided the same day as Kramer, the Supreme Court held that a Louisiana statute limiting the franchise in a bond election to property tax holders violated the equal protection clause of the Fourteenth Amendment, applying the Kramer compelling interest equal protection standard of review. Cipriano v. City of Houma, 395 U.S. 701, 704 (1969).

In Evans v. Corman, 398 U.S. 419, 422 (1970); the court stated:

> "Before that right (to vote) can be restricted, the purpose of the restriction and the assertly overriding interest served by it must meet close constitutional scrutiny."

And in City of Phoenix v. Koldziejski, 399 U.S. 204, 209 (1970) in holding that state constitutional and statutory provisions excluding non-property owners from voting in elections for the approval of the issuance of general obligation bonds violated the equal protection clause of the Fourteenth Amendment, the Court applied test of whether to justify such an exclusion there was a "overriding interest. . .which the State is entitled to recognize."

This is also the teachings of Dunn v. Blumstein, 405 U.S. 330 (1972).

Section 21-1-27 of the Mississippi Code of 1972 excluded from the right to vote all persons otherwise qualified to vote who live in territory sought to be annexed by a municipality. Under the foregoing authorities, therefore, to be constitutional, this exclusion must be justified by a compelling state interest.

Petitioners submit that the State of Mississippi has no compelling state interest in denying these qualified voters the right to vote. Petitioners assert first that the burden of proof is upon the State to show that there is such a compelling state interest; second, that the statutory provisions of Section 21-1-27 amply demonstrates that there is no such compelling state interest.

The state has by this Section created an unconstitutional classification as to their qualified voters and residents living in the territory sought to be annexed by denying them the same right to vote by petition granted to incorporators or residents voting by petition to be included or excluded from an existing municipality. This Court has addressed itself to simular classification which classification was less onerous in the case of Reynolds v. Sims 377 U.S. 533.

"To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the wieght of a citizen's vote cannot be made to depend on where he lives.

Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in a city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of government of the people, by the people, and for the people. The Equal Protection Clause demands no less than substantially equal state legislative representation

for all citizens, of all places as well as of all races."

The Annexation Proceedings should not have been considered and construed by the Court since it was based upon an unconstitutional statute.

In the recent case of City of Eastlake v. Forest City Enterprises, Inc. No. 74-1563 decided June 21, 1976. This Court upheld the right to vote on a zoning ordinance in Ohio. In that case the Court said:

> "A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters an exercise by the voters of their traditional right to override the views of their elected representatives as to what serves the public interest." Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F. 291, 294 (CA9 1970).

This Mississippi Statute makes second class citizens out of citizens who live outside the Corporate boundries and subjects of annexation. The cases are too numerous to cite that hold that a citizen of the United States must be a first class citizen with full rights to vote as all other classes. To deny the rights to vote to these citizens would deny to them Equal Protection under the Constitution of this United States and for these reasons Petitioners pray that this Honorable Court will so hold.

CONCLUSION

For these reasons, a writ of Certiorari should service to review the Judgment and Opinion of the Supreme Court of Mississippi.

Respectfully submitted,

Edward H. Lowe, et al
Jackson, Mississippi

John Arthur Eaves
Attorney for Petitioners

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Jackson, Mississippi 39201

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,316

EDWARD H. LOWE, ET AL.

V.

CITY OF JACKSON, MISSISSIPPI

BEFORE PATTERSON, ROBERTSON AND BROOM, JUSTICE, FOR THE COURT:

Annexation of 52.13 square miles in six areas was desired by the City of Jackson (Jackson herein) which adopted an ordinance on August 27, 1974, defining the subject lands. Miss. Code Ann. Section 21-1-27 (1972). Jackson then petitioned the Chancery Court of the First Judicial District of Hinds County for a decree under Mississippi Code Annotated Section 21-1-29 (1972), ratifying, approving, and confirming the proposed enlargement of its municipal boundaries. After hearing voluminous and conflicting testimony, the chancellor decreed ratification and confirmation of the ordinance as to about forty square miles. We affirm.

The appellants (objectors) argue: (1) Mississippi Code Annotated Section 21-1-27, supra, upon which the decree appealed from is based, violates the "equal protection clause of the 14th Amendment of the Constitution of the United States," and (2) the chancellor erroneously held that the "annexation was reasonable and was required by public convenience and necessity."

I.

As to the constitutionality of Section 21-1-27, supra, the appellants say that it denies to the qualified electors the right to vote by petition or otherwise, and accordingly denies them the equal protection guaranteed by the United States Constitution. The constitutionality of the section (Sec. 3374-10 in our 1942 Code) was upheld in Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), but there the argument was that the property of the objectors would be subject to taxation to pay general obligation bonds issued by Biloxi prior to passage of the annexation ordinance.

When the Mississippi Legislature enacted Section 21-1-27 granting unto municipalities the power of annexation, the lawmakers specifically legislated so as to permit such annexation of land without any requirement that the inhabitants of the subject area give prior consent or in any way express their approval. The United States Supreme Court held in Hunter v. City of Pittsburgh, 207 U.S. 161, 177-79, 28 S. Ct. 40, 46-47, 52 L. Ed. 151 (1907), that municipalities, as creatures of the state, may exercise such powers "as may be entrusted to them." It further held in Hunter that the territorial area of a municipality may be expanded "with or without the consent of the citizens, or even against their protest." The right or power of a municipality in this state acting under the legislative mandate of Section 21-1-27 to extend its boundaries without the consent of those living within the path of the extension was also litigated and upheld in Texas Gas Transmission Corporation v. City of Greenville, 242 So. 2d 686, 689 (Miss. 1971). See 2 E. McQuillen, The

Law of Municipal Corporations, Section 7.16 (3d ed. 1966); City of Biloxi, Mississippi v. Cawley, 332 So. 2d 749 (Miss. 1976); and City of Jackson, Mississippi v. The Town of Flowood, Mississippi, 331 So. 2d 909 (Miss. 1976).

No showing was made by appellants that Jackson was by means of annexation gerrymandering its voting precincts to discriminate against any particular class of objectors. No evidence indicated that any litigant was the subject or object of discrimination. Appellants assert that the annexation would be unconstitutional because the residents would be subject to the control of municipal officers in whose election they did not vote. However, there is no substance to this assertion. No cited case has ever required an immediate election. Such is not the law and we cannot so hold as long as Section 21-1-27 remains in its present form — only the legislature can alter its terms. Interesting is the fact that there was a time when the issue of annexation was one triable by jury, but that requirement was changed by the legislature. Kraetzer Cured Lbr. Co. v. Town of Moorhead, 118 Miss. 736, 80 So. 4 (1918). Many citizens, like the chancellor in City of Biloxi v. Cawley, supra, are convinced "that the people in the territory. . .should have the right to vote on the question of their being taken into the municipality." However, as noted by him, "such an election" is not provided by present statutes, and the Constitution does not permit courts to judicially legislate and thereby "change the statutes" created by the legislative branch of our government.

Appellants point to the fact that in cases involving areas proposed to be incorporated, qualified voter in-

habitants are allowed to "vote by Petition" on the proposed incorporation (Miss. Code Ann. Sec. 21-1-13 (1972)). Similarly, Mississippi Code Annotated Section 21-1-45 (1972) allows voting by petition where citizens voluntarily seek either annexation to or exclusion from an area already incorporated. On this basis appellants say they are denied equal protection of the law because they are not permitted to vote on the annexation proposition initiated by Jackson, an existing incorporated city. There is no merit to such an argument because there is "a fundamental difference of some magnitude" between incorporation of an unincorporated area on the one hand and the extension of corporate boundaries on the other. Hamilton v. Incorporation of Petal, 291 So. 2d 190 (Miss. 1974). The legislature, aware of the distinction between the two legal processes (incorporation and annexation), saw fit to legislate as reflected in the statutes referred to above, and we are unable to say that enactment of the statutes resulted in any arbitrary or irrational classification.

II.

Burdened with showing that the annexation was reasonable and required by public convenience and necessity pursuant to Code Section 21-1-27, supra, Jackson presented testimony from a large number of witnesses. These witnesses included experts whose testimony related to the following criteria set forth in Texas Gas Transmission Corp. v. City of Greenville, supra, at 689: (1) the city's need for expansion; (2) whether the area to be annexed is reasonably within the path of such expansion; (3) the potential health hazard from sewage and

water disposal; and (4) the city's financial ability to make improvements and furnish municipal services as promised.

Testimony showed that Jackson had a sewage treatment plant with adequate capacity to take care of the needs of the people in the subject area. Other testimony was that presently in the territory, health problems were posed by the sewage and waste water facilities which could be better controlled if annexation were allowed. Also heard by the chancellor was testimony showing a present need for police service in the area affected which could better be provided by annexation. It was shown that better fire protection and resulting savings in fire insurance premiums could be furnished if the area were annexed. Other evidence demonstrated a need for better street lighting in the area of proposed annexation that could be provided within a reasonable time after annexation.

Additional testimony was to the effect that if the territory were annexed Jackson could provide better recreational facilities and better garbage pickup service to the inhabitants. In summary, there was testimony in support of each of the five pertinent criteria according to Texas Gas Transmission Corp., supra, and to the effect that Jackson had the financial ability to make the improvements and furnish all municipal services as promised.

To the contrary, appellants presented testimony, including that of experts, tending to indicate that under the applicable criteria annexation was improper. Much of their testimony concerned the fact that a considerable

portion of the land sought to be annexed was open or swamp land which Jakcson had no reason to annex. As pointed out by us in Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960), where it can be reasonably anticipated that the parcel of land will become a part of the city within a reasonable time, such property may be taken in so as to develop it properly and wisely with reference to the securing of water, the development of streets and the collection and disposal of sewage and waste "rather than to let the area develop in a harum-scarum manner."

After hearing the conflicting expert opinions and radically divergent testimony, the chancellor (empowered by the legislature to act as he did) accepted that offered on behalf of Jackson. In our judgment, the evidence in behalf of Jackson was substantial and formed a sufficient basis to support the decree appealed from. Supported by substantial evidence and not manifestly wrong or against the weight of the evidence, the chancellor's decree must be affirmed.

AFFIRMED.

GILLESPIE, C.J., PATTERSON, P.J., INZER, P.J., and SMITH, ROBERTSON, SUGG, WALKER and LEE, JJ., CONCUR.

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

NO. 94254

IN THE MATTER OF THE EXTENSION

OF THE BOUNDARIES OF THE

CITY OF JACKSON, MISSISSIPPI

MOTION TO DISMISS

Comes now Edward H. Lowe, Juanita Taylor, Selby Crenshaw, Harold Ferguson, Janie Parish, Barbara Thornton, Fred Hoerner, Frank Stewart, Ernest Weaver, George Clements, Herbert Tullos, Henry Williams, Hollis Grice, Aaron Williams, John Rivers, J. K. Webb, Doug McCurley, Charles Shirley, W. L. Graves and Edward Martin Peusch, individually and for and on behalf of others joined herein by Petition, and without waiver of any other defenses by and through their attorney, and files this their Motion to Dismiss and in support thereof would show unto the Court the following, to-wit:

I.

That Section 21-1-27 Mississippi Code of 1972 Annotated, violated the Fourteenth Amendment of the Constitution of the United States as well as being in violation of the Constitution of the State of Mississippi, and is therefore unconstitutional.

2.

That said violates said Constitution in that it allows Taxation of Movants without representation and is therefore invalid and unconstitutional.

3.

That the actions of the Petitioners are unconstitutional and in violation of said Constitution in that said Ordinance deprives them of their property without due process of law.

4.

That said Ordinance of the City of Jackson violated the Constitution of the State of Mississippi as well as the Constitution of the United States of America in that it provides no notice or opportunity to be heard prior to passage and is, therefore, unconstitutional and invalid.

5.

That said Ordinance is in violation of the Constitution of the State of Mississippi and the United States of America in that it subjects them to Ordinances, taxes and jurisdiction without their approval or consent and violated Article IX and X of the Constitution of the United States of America and is therefore, invalid.

6.

That said Ordinance and Petition are invalid in

that it will subject movants to irregular and unequal taxation in violation of Section 112 of the Constitution of the State of Mississippi. That said movants will be subject to unequal assessments in violation of the Constitution and is, therefore, invalid.

7.

Other reasons to be shown at there hearing hereof.

WHEREFORE, PREMISES CONSIDERED, Movants pray that upon a hearing hereof the Court will dismiss the Petition.

Respectfully submitted,

EDWARD H. LOWE, ET AL

BY:_____

JOHN ARTHUR EAVES,
Attorney for Movants

CERTIFICATE

I, the undersigned attorney of record for Movants hereby certify that I verily believe the above and foregoing to be well taken and that the same is not filed for delay but should be sustained.'

_____

JOHN ARTHUR EAVES,
Attorney for Movants

CERTIFICATE

I, John Arthur Eaves, Attorney for Movants, certify that I have this day mailed, postage prepaid, to the Honorable L. Arnold Pyle and Honorable John E. Stone, Attorney of record for the City of Jackson, a true and correct copy of the above and foregoing Motion at their usual post office address.

This the 28th day of October, 1974.

JOHN ARTHUR EAVES

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

IN THE MATTER OF THE EXTENSION

OF THE BOUNDARIES OF THE

CITY OF JACKSON, MISSISSIPPI

NO. 94,254

ORDER OVERRULING MOTION TO DISMISS

This cause came on to be heard upon the Motion of Edward H. Lowe, et al., by their attorney, John Arthur Eaves, to dismiss the Petition herein on numerous grounds as set forth in paragraphs one through seven of said Motion, the first of which the movants allege that Section 21-1-27 Mississippi Code of 1972 Annotated, violated the Fourteenth Amendment of the Constitution of the United States as well as being in violation of the Constitution of the State of Mississippi, etc., and the Court having heard and considered argument of counsel, and being fully advised in the premises, is of the opinion that said Motion should be and the same is hereby denied.

Ordered, adjudged and decreed this the 13th day of November, 1974.

CHANCELLOR

**IN THE CHANCERY COURT
OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

NO. 94,254

IN THE MATTER OF THE EXTENSION
OF THE BOUNDARIES OF THE
CITY OF JACKSON, MISSISSIPPI

THE CITY OF JACKSON, MISSISSIPPI
A MUNICIPAL CORPORATION PETITIONER

W. K. GOFF, EDWARD M. PEUSCH,
EDWARD H. LOWE, THE BAPTIST
CHILDREN'S VILLAGE, ET AL. OBJECTORS

OPINION OF THE COURT

At a regular meeting of the Council of the City of Jackson, Mississippi, held on August 27, 1974, an ordinance was duly enacted extending and enlarging the corporate limits of the City. The area proposed to be annexed consists of 52.13 square miles, or 33,363.20 acres of land. The said ordinance was published according to law.

On September 13, 1974, the City filed its petition in this Court for ratification, approval and confirmation of the ordinance. A certified copy of the ordinance, together with the requisite map, was attached to the petition. The ordinance defines with certainty the territory proposed to be included in the corporate limits, and also

defines the entire boundary as changed.

In accord with the terms and provisions of Sec. 21-1-27, Miss. Code, 1972, the ordinance in general terms describes the proposed improvements to be made in the territory proposed for annexation, the manner and extent of such improvements, and the approximate time within which such improvements are to be made. It is stated that the City shall make the following improvements in the territory proposed for annexation within a reasonable time, not to exceed five (5) years from the effective date of the ordinance, unless delayed by war or military preparedness:

> "(a) Improve existing streets and drainage.
>
> "(b) Install water lines, water service, sewage disposal lines, sewage treatment facilities and street lighting, where necessary and economically feasible.
>
> "(c) Said services shall be furnished in the same manner and to the same extent as such services are being furnished to the present citizens of the municipality."

The ordinance further sets out a statement of the municipal or public services which the City proposes to render in the annexed territory, to-wit:

> "(a) Police protection.
> "(b) Fire protection.
> "(c) Garbage removal.

approve, ratify and confirm the ordinance if found to be reasonable, (2) to modify the proposed enlargement or contraction by decreasing the territory to be included or excluded, or (3) to deny in to the proposed enlargement or contraction if found to be unreasonable. Lippian v. Ros, 253 Miss, 325, 175 So.2d 138 (1965).

A thorough study of the maps, charts and other exhibits received in evidence, in connection with the testimony of knowledgeable and believable witnesses, shows the following:

(1) Sections 1 and 2 of T4N, R1W, together with Sections 29, 32, 33, 34 and 35 of T5N, R1W, located in the southwestern part of the territory sought for annexation, are for the most part unimproved. Section 2 contains the clubhouse and other facilities of Brookwood Country Club, which can in no sense be considered an "urbanized" area in need of municipal control for residential, commercial or industrial use and purposes. In recent years certain parts of this area have attained some degree of growth, particularly along McCluer Road, Old Miss. Highway 18 (Raymond Road), Forest Hill Road, and Maddox Road. But the great majority of this land is either wild and unproductive or utilized for cropland and pastureland. In weighing the proposition of municipal taxation against the mere possibility of future city growth into this area at some unforeseen and unpredictable time, the Court is of the opinion that annexation of parts of this area (set out with certainty hereinafter) would be unreasonable.

(2) Sections 9, 10, 15 and 16 of T5N, R1W, lying

in the western portion of the territory sought for annexation, consist mostly of unimproved, rural land. There is presently some new construction in the proximity of the intersection of Maddox Road and New Miss. Highway 18, and along New Miss. Highway 18 West of the Maddox Road intersection. Timberlawn Elementary School is located in the S 1/2 of the S 1/2 of said Section 16, but this section is traversed by only one thoroughfare and contains the Hinds County garbage dump. The Court is of the opinion that annexation of parts of this area would be unreasonable.

(3) Section 7 of T6N, R1E, and those parts of Sections 10 and 15 of T6N, R1W, situated in the area sought for annexation, which sections are in the northern portion of said area, are predominantly rural and unimproved. Most apparently this land has not been affected by the "growth pattern" of the City, and due to its location and lack of roadways it will be a number of years before urbanization and its attendant need for municipal control will become a reality. The Court is of the opinion that it would be unreasonable to annex this territory.

(4) The testimony shows that Section 22 of T6N, R1W, in the northern part of the area sought for annexation, lying adjacent to the corporate limits of the City of Clinton, contains 49 homes, 9 trailers (non-permanent dwellings), 2 barns, 1 church, 3 shops, and 1 store. The thoroughfares in this section consist of the Old Vicksburg Road, Magnolia Road, and Hobby Farms Road. If house trailers are counted, the curtilage of each habitation, in relation to the acreage in the entire section, would average out to 11.03 acres. Mr. Don Irvin, the Director of the

Jackson City Planning Board, testified that 6 or 8 dwellings to the acre would be considered a "low density" situation. The annexation of this section would be unreasonable.

(5) The Baptist Children's Village is situated in a portion of the N 1/2 of Section 23, T6N, R1W, west of Flag Chapel Road. This facility is in the northern portion of the area sought for annexation, and consists of some 149 areas. This is a charitable nonprofit corporation, being an official agency of the Mississippi Baptist Convention. Its purpose is for the training, nurture, religious upbringing, and the physical and mental care of children who have been abandoned or neglected, or who are the unfortunate products of broken homes. This facility consists of 23 one-story brick buildings in campus configuration. It has its own sewage lagoon, constructed with its own funds, designed for a population in excess of that which it presently has, and regularly inspected by officers of the Environmental Protection Agency. It takes care of its own garbage removal daily; garbage is stored in sanitary metal containers and hauled away by a private firm four times weekly. It owns and maintains its fire protection equipment, and has adequate water mains with a plug for each building. The buildings are spaced at such distances that a fire in one would not affect another. It maintains its own campus security. It has about 50 mercury vapor lights along its streets. It maintains its own streets. It has its own recreational facilities. It purchases its water from the City, but otherwise is in no way dependent upon the City. In an average year it takes in and cares for the needs of about 325 children.

On an average, there are about 150 children, at any given time, of school age in the Baptist Children's Village. These children go to school in the Clinton Municipal Separate School District. Baptist Children's Village owns and maintains its own vehicles to transport its children to and from school. The school authorities in Clinton have, over the years, given special attention to the problems of these children.

Expert witnesses described these children as having a "built-in feeling of fear", as being "vulnerable, susceptible and frightened", as having "an insecure feeling —— psychological problems arising from the common thread of abandonment by their parents", and as having "problems of instability, with disciplinary problems greater than those of average children."

Dr. Gerald Pascal, a qualified clinical psychologist employed by Baptist Children's Village, testified that these children have a different set of standards from those of normal children. He said they were not well-adjusted, and are sometimes rebellious —— and that some of them are "even suicidal."

The testimony showed that these children, on an average, are scholastically "on a much lower level" than normal children. Between 25% to 40% of them require special education due to their unstable family background. Dr. Virgil Belue, Superintendent of the Clinton Municipal Separate School District, testified that special education classes have been designed for the Clinton schools with Baptist Children's Village pupils specially in mind.

Dr. Pascal testified that, in his opinion, these children should continue to attend school together, especially due to their need to "lean on one another for support." He said that, in his opinion, being together in school provides stability, and means a lot to these children. He said that he is of the opinion that the removal of these children from the Clinton schools would be disruptive, disturbing and detrimental to them.

The Jackson Municipal Separate School District maintains excellent schools, counselling and facilities. But, according to the testimony of John D. Watson, Jr., the Director of Pupil Accounting for the Jackson schools, it is not uncommon that a family with four children would have to send each to a separate school.

In view of the above, this Court is of the opinion that annexation of the Baptist Children's Village land would be unreasonable.

The territory sought for enlargement by the City will be modified by deleting therefrom the following described land lying and being in the First Judicial District of Hinds County, Mississippi, to-wit:

In Township 4 North, Range 1 West:

All that part of Section 1 lying southwest of the southwesterly right-of-way line of Forest Hill Road.

All that part of Section 2 lying west of the westerly right-of-way line of Forest Hill Road.

In Township 5 North, Range 1 West:

All of Section 9.

All that part of Section 10 lying west of the westerly right-of-way line of Maddox Road.

All that part of the N 1/2 of Section 15 lying west of the westerly right-of-way line of Maddox Road.

The N 1/2 and the N 1/2 of the S 1/2 of Section 16.

Section 29, LESS AND EXCEPT that portion of said section lying north of the southerly right-of-way line of Old Miss. Highway 18 (Raymond Road) and east of the north-south half-section line of said section.

All of Section 32.

Section 33, LESS AND EXCEPT that portion of said section lying north of the southerly right-of-way line of McCluer Road.

The S 1/2 of Section 34.

All that portion of the S 1/2 of Section 35 lying west of the westerly right-of-way line of Forest Hill Road.

In Township 6 North, Range 1 East:

Section 7, LESS AND EXCEPT all that por-

tion of said section lying south of the northerly right-of-way line of Forest Avenue Extension.

In Township 6 North, Range 1 West:

All of that part of Section 10 lying southeast of the southeasterly right-of-way line of the proposed Natchez Trace Parkway, being all of said Section 10 lying within the proposed annexation area.

All of that part of Section 15 lying southeast of the southeasterly right-of-way line of the proposed Natchez Trace Parkway, being all of said Section 15 lying within the proposed annexation area.

All of Section 22.

All of that part of the N 1/2 of Section 23 lying west of the westerly right-of-way line of Flag Chapel Road and south of the southerly right-of-way line of Northside Drive.

At this point it should be noted that the evidence shows that the City of Jackson is vested with title to approximately 900 acres of land in Sections 4 and 5, T4N, R1E, and in Sections 32 and 33, T5N, R1E, which land is in the southeast corner of the territory sought for annexation. The land in this area is virtually uninhabitable due to the fact that it is in an extremely low marsh, but the evidence shows that the intention of the City is to construct and maintain a park facility (wildlife preserve) in this area.

During the hearing, the City adduced evidence as to its financial ability and administrative ability to afford the territory within the expansion area with the improvements and services set out in the ordinance. The City Council, being a legislative body, found that the expansion area with the improvements and services set out in the ordinance. The City Council, being a legislative body, found that the expansion herein sought is in, and required by, the public convenience and necessity. See Ritchie v. City of Brookhaven, 217 Miss. 860, 65 So.2d 436 (1953). The record amply reflects, and the Court finds, that the City met the burden of proof of public convenience and necessity for the expansion.

The Court finds that the enlargement herein sought, as modified by the decrease in territory as hereinabove specified set out, is reasonable; that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time; and that the improvements set out in the ordinance will be completed within a reasonable time, not to exceed five (5) years from the effective date of the ordinance, unless delayed by war or military preparedness.

A decree will be drawn and submitted approving, ratifying and confirming the proposed enlargement as modified by the decrease in territory hereinabove specifically set out. Said decree shall contain a description of the territory annexed, as so modified. A map or plat of the territory so approved, ratified and confirmed for annexation, taking into account the modification herein

made by the Court, will be filed among the papers in this cause.

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CHANCELLOR

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,316

EDWARD H. LOWE, ET AL
APPELLANT

VS.

CITY OF JACKSON, MISSISSIPPI
APPELLEE

PETITION FOR REHEARING

Comes now the Appellant and respectfully suggest that this Court erred in its affirmance of the order of the Court below. Appellant, with respect, suggest that the Court's decision in this cause is erroneous in that it is based upon Hunter Vs. City of Pittsburgh, 207 U.S. 161, 177-79, 28 S. CT 40, 46-47, 52 L. Ed 151 (1907).

Respectfully submitted,

_____

JOHN ARTHUR EAVES

101 Bankers Trust Plaza Building
Jackson, Mississippi 39201

Attorney for Appellant

CERTIFICATE

I, John Arthur Eaves, the Attorney for the Appellants, do hereby certify that I have this day hand-delivered a true and correct copy of the foregoing Petition for Rehearing to Hon. L. Arnold Pyle, Attorney for Appellee.

THIS _____ day of August, 1976.

_____
JOHN ARTHUR EAVES

IN THE SUPREME COURT OF MISSISSIPPI

TUESDAY, SEPTEMBER 7, 1976, COURT SITTING:

EDWARD H. LOWE, ET AL

#49,316 VS

CITY OF JACKSON

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same En Banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

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